NO. ~~775~~ 96

In the Supreme Court of the United States

OCTOBER TERM, ~~1950~~ 51

HOWARD HUGHES, *Appellant*,

v.

THE UNITED STATES OF AMERICA.

Appeal from the United States District Court for the Southern District of New York.

MOTION TO AFFIRM

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Equity No. 87-273

UNITED STATES OF AMERICA, *Plaintiff*

v.

RADIO-KEITH-ORPHEUM CORPORATION, ET AL., *Defendants*

MOTION TO AFFIRM

Pursuant to Rule 12, Paragraph 3, of the Revised Rules of the Supreme Court, appellee United States of America moves that the order of the district court be affirmed.

In 1938 the United States brought a civil proceeding under Section 4 of the Sherman Act against the eight leading distributors of motion picture films. Radio-Keith-Orpheum Corporation and certain of its subsidiaries, which will be collectively referred to as RKO, were defendants in this proceeding. Appellant was not a defendant but on November 8, 1948, when a consent decree was entered against RKO, he was its dominant stock-

holder and he consented to, and agreed to become bound by the terms of, Section V of the decree. The present appeal is from an order of the district court fixing certain terms and conditions of a trust agreement provided for, and established pursuant to, Section V.

The proceedings in this case (generally known as the *Paramount* case) have been protracted and have twice come before this Court.[1] A consent decree entered in 1940 ran for a trial period of three years. Thereafter, following trial of all issues in the case, the district court on December 31, 1946, entered a final judgment against the defendants. 70 F. Supp. 53. On appeal therefrom, this Court affirmed in part and reversed in part, and remanded the case to the district court for further proceedings. 334 U.S. 131.

Prior to the district court's determination of the issues committed to it by the remand, the Government and RKO agreed upon a final settlement of these issues as between themselves and submitted to the district court a consent decree which was entered on November 8, 1948. The decree provided, *inter alia*, for divorcing RKO's exhibition business from its production and distribution business. Such divorcement was to be carried out within a year from the date of the decree, by turning over RKO's exhibition business to a new theatre company and its production and distribution business

[1] There have also been several appeals to this Court from orders denying leave to intervene. *St. Louis Amusement Co. v. United States*, 326 U.S. 680; *Ball, Trustee v. United States*, 338 U.S. 802; *Partmar Corp. v. United States*, 338 U.S. 804; *Sutphen Estates, Inc. v. United States*, No. 668, this Term.

to a new picture company, with the stock of these new companies going to RKO's stockholders in proportion to their holdings of RKO stock.

Appellant was RKO's dominant and controlling stockholder at the time the consent decree was entered.[2] The divorcement provided for in the decree obviously would have been nominal rather than real if appellant had continued as the dominant stockholder of each of the two new companies to be created by RKO. Section V of the decree, which was designed to prevent this, thus was an essential element of the decree. It provides that within one year from the date of the decree the appellant shall either (a) dispose of all of his stockholdings of one of the new companies or (b) deposit all of his stock in one of these companies under a trust agreement to remain in force until appellant should have sold all of his stock in one of the new companies. It provides that the trustee shall exercise all voting rights of the trusteed stock, and it further provides: "Such trust shall be upon such other terms or conditions, including the compensation to the trustee, as shall be prescribed by the Court."

RKO did not effect divorcement within the year's time provided for in the decree. On RKO's

[2] He owned 24% of RKO's stock and no other stockholder owned as much as 1% of its stock. His control of RKO was conceded by his counsel in the hearing on the order now being appealed. Counsel stated that "it was his [appellant's] influence that caused RKO to go down and enter into this agreement with the Government and agree to settle this litigation. It was * * * the new stock control that enabled the Government to do this very thing in the first place." (Tr. of Hearing of February 15, 1951, pp. 24-25.)

request, and with the Government's consent, the court granted RKO an additional six months to effect divorcement. Subsequently RKO filed a motion, to which appellant consented, to modify the consent decree by extending the time for divorcement for a further period of three years. The Government, in opposing this motion, contended that neither RKO nor appellant had made any effort to comply with the divorcement provisions of the judgment.[3] The district court did not grant the extension sought by RKO but did enlarge the time for completing divorcement to December 31, 1950. As a result of these enlargements of the time for divorcement, appellant's obligation under Section V, to sell his stockholdings in one of RKO's successor companies within a year from the decree or deposit the stock of one of the companies with a trustee pending sale thereof, was extended from November 8, 1949, to December 31, 1950.

The trust provided for by Section V of the decree was set up by an order of the district court entered on December 28, 1950, approving a stipulation between the appellant and the Government filed with the court on the same day. The order appoints a trustee to hold appellant's stock in the new theatre company and fixes certain terms and conditions of the trusteeship. The stipulation sets

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[3] A consent decree entered against Paramount Pictures, Inc., on March 3, 1949, provided for divorcing Paramount's exhibition business from its production and distribution business by turning over the former to a new theatre company and the latter to a new picture company. Although Paramount's assets were considerably greater than RKO's, Paramount completed the required divorcement in approximately nine months.

forth that it is the understanding of the parties that the Government will file a motion during January 1951 asking for entry of an order establishing as one of the terms of the trusteeship that, if appellant shall not have not sold the trusteed stock within a year from the date of the court's order, the trustee shall sell this stock under the terms and conditions to be established by the court. The stipulation also sets forth that appellant will contest such motion.

On January 15, 1951, the United States filed the motion contemplated by the stipulation. After argument of the motion on February 15 and February 21, 1951, and after the filing of supporting and opposing briefs and affidavits, the district court on March 24, 1951, entered the order from which the present appeal is taken. The order amends the order of December 28, 1950, appointing a trustee by providing that, if appellant shall not have disposed of the trusteed stock by February 20, 1953, the trustee shall dispose of this stock by February 20, 1955. The order provides that the trustee shall submit for the approval of the court, upon notice to the parties, any proposed disposition of this stock. The order also provides that the stock shall be disposed of "so far as possible without sacrifice to the beneficial owner."

The gravamen of appellant's attack upon the order of March 24, 1951, as set forth in his jurisdictional statement, is that the order amends the consent decree, and that adequate grounds for the amendment have not been shown. We submit that the attack rests upon a misinterpretation of the court's order. The order does not amend the consent decree. It is an exercise of the authority ex-

pressly conferred by Section V of the decree, to establish the terms and conditions of the trust agreement provided for in Section V.

The district court clearly did not abuse its discretion in determining that it was appropriate and necessary to include in the terms and conditions of the trust agreement time limitations on disposition of the trusteed stock. The district court knew that RKO had succeeded in delaying divorcement for nearly 14 months beyond the period fixed by the consent decree and that it had sought to delay divorcement by three and a half years beyond this period. Certainly in these circumstances the district court might reasonably determine that the interim trusteeship set up by Section V pending disposition of appellant's stock interest in one of RKO's successor companies should not continue indefinitely but that there should be a sale of such stock and an end to the trust within six years and some three months after entry of the consent decree.[4] During the hearing in the district court there was the following pertinent colloquy:[5]

> JUDGE HAND: Well, you are claiming the most extreme interpretation of that agreement, which really is that he does not have to do anything ever.
>
> MR. SLACK [appellant's counsel]: I think that is what it says.
>
> JUDGE HAND: That he does not have to do anything ever; that he can say, "Well, I like

[4] The consent decree was entered on November 8, 1948. The order of March 24, 1951, requires sale of the trusteed stock by February 20, 1955.

[5] Tr. of hearing of February 15, 1951, p. 27.

this stock; it is good enough for me; I can't vote it, to be sure, but that is good enough for me. It is a very pleasant situation I am in, and I am getting the income from it"—whether it is good or bad, I don't know—"And I am going to stick to that."

There is certainly a remedy against that.

Appellant has stock control of the new picture company.[6] At the same time he is equitable owner of 24% of the stock of the new theatre company and entitled to dividends declared on such stock. There is therefore powerful inducement to utilize his control of the new picture company to cause it to grant the new theatre company preferences and competitive advantages denied to others, in other words, to continue to operate on the basis of a vertically integrated enterprise notwithstanding the district court's condemnation of vertical integration in the case of other defendants in the *Paramount* case. Following remand and after consent decrees which provided for divorcement had been entered against RKO and Paramount, the district court held that adequate relief against further violation of the Sherman Act required divorcement of the theatre interests of the three remaining inte-

[6] At the hearing in the district court appellant made no attempt to show that there had been any change since entry of the consent decree with respect to his stock control of RKO. And the Government's brief in the district court pointed out that in recent years three of RKO's seven directors have been direct representatives of appellant. He himself was a director, his counsel (T. A. Slack) was another, and a third was Noah S. Dietrich, who is executive vice president of the Hughes Tool Company of which appellant is president.

grated defendants (Fox, Loew and Warner). *United States* v. *Paramount Pictures, Inc.*, 85 F. Supp. 881, 893-896, affirmed per curiam, 339 U.S. 974. The district court found: "The vertical integrations aided * * * at every point" defendants' "horizontal conspiracy as to price-fixing, runs and clearances" (85 F. Supp. 894). It concluded that it would not be justified in leaving those who had participated in improper practices "free to continue them except for [the] inadequate injunctive provisions" and that "the divorcement we have determined to order appears to be the only adequate means of terminating the conspiracy and preventing any resurgence of monopoly power on the part of the remaining defendants" (*id.*, p. 896).

Appellant's jurisdictional statement points to the language in Section V that the trust therein provided for shall remain in force until "Howard R. Hughes" shall have sold his stockholdings in one or the other of RKO's successor companies. Appellant suggests that when Section V provides that the court may prescribe "other" terms or conditions of the trust, this does not authorize the prescription of any term or condition under which anything other than a sale by Howard R. Hughes might bring the trust to an end. We submit, however, that Section V implicitly obligates appellant to make a prompt sale and that the terms or conditions of the trust which the court is authorized to prescribe may provide that when appellant is in default in this obligation, it devolves upon the trustee. The court's order of March 24, 1951, does not modify the duration of the trust as set forth in Sec-

tion V. Under that order the trust remains in force until a sale by appellant or, if he has not sold by February 20, 1953, until a sale by the trustee on his behalf.

But even if the order of March 24, 1951, should be regarded as amendatory of Section V, we submit that authority for the order is conferred by Section VIII, B, of the decree. This section provides:

> B. *Jurisdiction* of this cause *is retained for the purpose of enabling any of the parties* to this consent decree to *apply to the Court* at any time *for such orders or direction as may be necessary or appropriate for the* construction, *modification* or carrying out *of the same*, for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief. [Emphasis supplied.]

Appellant's contention in effect asks the Court to qualify the broad general language of the decree with respect to modification by adding thereto the limitation that there shall be no modification of its provisions in the absence of "a showing of changed conditions which were unforeseen at the time of the decree." We submit, therefore, that the party seeking modification of the decree is the appellant, not the Government.

In any event, there have been changes in circumstances and conditions subsequent to entry of the decree which clearly warrant entry of this order. As we have previously stated, Section V constitutes an essential element of the divorcement required by the decree. By the terms of the decree

such divorcement was to be completed by November 8, 1949. But by virtue of RKO's subsequent requests and representations divorcement was not effected within the time fixed by the decree. It was not only postponed to December 31, 1950, but if RKO and appellant had fully prevailed in their requests, it would have been postponed to November 8, 1953. The related obligations imposed on the appellant by Section V have been correspondingly postponed. This constitutes a material change in circumstance occurring since entry of the decree.

There were other new and material circumstances occurring subsequent to the consent decree. After such decree, Paramount entered into a consent decree and effected divorcement thereunder. After such decree, the district court determined, as to the three remaining integrated defendants in the *Paramount* case, that adequate relief against further violation of the anti-trust laws required divorcement of their theatre interests. The interpretation which appellant places upon Section V may be regarded as another new circumstance. In the present proceeding appellant's position was that the trust agreement provided for in Section V is not a merely interim arrangement to permit orderly liquidation of his stock interest in one of the successor companies, but constitutes a sanctuary for indefinite continuation of his ownership of all of his stock in the new theatre company while continuing to retain all of his stock in the new picture company.

We submit that these new circumstances clearly warranted the court in setting an outer time limit

for final disposition of the trusteed stock. And the time limit actually fixed by the court, which runs to more than six years from the date of the entry of the consent decree, certainly is, by any test which might be applied, reasonable and fair to the appellant.

For the foregoing reasons, it is evident that this appeal presents no substantial question. It is therefore respectfully submitted that the order of the district court of March 24, 1951 should be affirmed.

PHILIP B. PERLMAN,
Solicitor General.

May 1951.

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Brief for the U.S.

No. 86

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OPINIONS BELOW

The district court did not render an opinion in conjunction with its order granting appellee's motion, here appealed from. Two prior opinions of the district court in the antecedent proceedings are reported in 66 F. Supp. 323 (reversed in part and affirmed in part, 334 U. S. 131), and 85 F. Supp. 881 (affirmed *per curiam*, 339 U. S. 974).

JURISDICTION

The three-judge district court entered its order on March 24, 1951 (R. 211). The petition for appeal was filed and allowed on April 19, 1951

(R. 211). The jurisdiction of this Court is invoked under Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. Code 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869, 15 U. S. C., Supp. IV, 29. On October 8, 1951, this Court noted probable jurisdiction (R. 269).

QUESTIONS PRESENTED

1. Whether the district court properly construed Section V of the consent judgment entered against the RKO defendants and appellant as conferring upon the court the right to direct a trustee to sell appellant's stock in RKO Theatres Corporation within a prescribed time.

2. Whether, in any event, the order of the district court was a proper exercise of its power, either under provisions of the judgment reserving to the court the right to amend the judgment or under its equity powers, to amend Section V of the judgment in order to effectuate its basic purpose.

STATUTE INVOLVED

The Act of July 2, 1890, 26 Stat. 209, 15 U. S. C. 4, known as the Sherman Act, provides in part as follows:

> Sec. 4 [as amended by the Act of March 3, 1911, Sec. 291, 36 Stat. 1167]. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several dis-

trict attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * *

STATEMENT

In 1938 the United States brought a civil proceeding under Section 4 of the Sherman Act against the eight leading distributors of motion picture films. Five of them were integrated companies having large motion picture theatre interests. One of these five was Radio-Keith-Orpheum Corporation and certain of its subsidiaries, which will be referred to as RKO. Appellant was not a defendant but in 1947 he acquired approximately 24% of the stock of RKO (R. 171, 249). On November 8, 1948, when a consent judgment was entered against RKO (R. 170–188), he was its dominant stockholder, and he consented to and agreed to become bound by the terms of Section V of the decree (R. 185–186). The present appeal is from an order of the district court fixing certain terms and conditions of a trust agreement provided for and established pursuant to Section V.

The proceedings in this case (generally known as the *Paramount* case) have been protracted and have twice come before this Court.[1] A consent

[1] There have also been several appeals to this Court from orders denying leave to intervene. *St. Louis Amusement Co.* v. *United States*, 326 U. S. 680; *Ball, Trustee* v. *United*

decree entered in 1940 ran for a trial period of three years. Thereafter, following trial of all issues in the case, a special expediting court consisting of three judges, sitting as a district court, entered findings of fact and a judgment against all of the defendants, including RKO. The judgment did not provide for divorcement of the exhibition business from the distribution business of the integrated defendants. All the defendants appealed from this judgment, and the Government appealed on the ground of inadequacy of relief. This Court affirmed in part and reversed in part and remanded the case to the district court for further proceedings, including determination of what, if any, divorcement relief should be decreed. 334 U. S. 131.

Prior to the district court's determination of the issues committed to it by the remand, the Government and RKO agreed upon a final settlement of these issues and submitted a decree to the district court, which included both the provisions in the earlier decree which had been affirmed by this Court and additional provisions agreed upon by the parties. This decree (R. 170–188), entered by the district court on November 8, 1948, provided, *inter alia*, for divorcing RKO's exhibition business from its production and distribution business.

States, 338 U. S. 892; *Partmar Corp.* v. *United States*, 338 U. S. 804; *Sutphen Estates, Inc.* v. *United States*, No. 25, this Term.

The judgment recited that the RKO defendants represented to the plaintiff that their plan of reorganization would effect divorcement (R. 171). Such divorcement was to be carried out within a year from the date of the decree by turning over RKO's exhibition business to a new theatre company and its production and distribution business to a new picture company, with the stock of these new companies going to RKO's stockholders in proportion to their holdings of RKO stock. Appellant owned 24% of RKO's stock and no other stockholder owned as much as 1% (R. 171). Section V of the judgment provided for disposition of appellant's stock in one or the other new companies within a year from the date of the judgment, and gave him the option of selling the stock himself or turning it over to a trustee who shall be entitled to vote the stock. Section V then provides (R. 186):

> Such voting trust agreement shall thereafter remain in force until Howard R. Hughes shall have sold his holdings of stock of the New Picture Company or the New Theatre Company to a purchaser or purchasers who is or are not a defendant herein or owned or controlled by or affiliated with a defendant herein, and upon such sale and transfer such voting trust agreement shall automatically terminate. Such trust shall be upon such other terms or conditions, including compensation to the trustee, as shall be prescribed by the

> Court. During the period of such voting trust, Howard R. Hughes shall be entitled to receive all dividends and other distributions made on account of the trusteed shares, and proceeds from the sale thereof.

Section VI of the judgment provides that during the period required for RKO to complete its reorganization, which in any event should occur within one year from the date of the entry of the judgment, nothing in the judgment should prevent RKO from favoring its theatres in the licensing of RKO pictures (R. 186).

The judgment also contained the standard provision (Section VIII B, R. 188):

> Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this consent decree to apply to the Court at any time for such orders or direction as may be necessary or appropriate for the construction, modification or carrying out of the same; for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief.

After further proceedings against the remaining defendants, the district court on February 8, 1950 entered a judgment against all the other defendants except Paramount, against whom a judgment somewhat similar to that of RKO had been entered on March 3, 1949. Divorcement on the part of all integrated defendants was required by these judgments. The judgment of February

8, 1950, was affirmed by this Court in 339 U. S. 974; 340 U. S. 857.

RKO did not effect divorcement within the year's time provided for in the decree. Prior to the end of the year (November 8, 1949), RKO sought the Government's consent to a one year extension. The Government was unwilling to consent to more than a six months' extension, and then only on two conditions. One was that there would be no extension of Section VI of the decree. The second condition was that appellant would agree that he would not petition for a further extension of time under Section V. These conditions were accepted (R. 242, 247–248).

RKO, having obtained this extension to March 15, 1950, brought before the district court in February 1950 several motions[2] which sought not only to modify the judgment by extending the time for divorcement to February 8, 1953,[3] but also other substantial modifications in the decree.[4] Among other things RKO, despite the condition imposed by the Government for its consent to a six months' extension, moved to reinstate Section

[2] These motions are not part of the printed record but are on file with the Court.

[3] Since defendants had already had 18 months within which to divorce, if their application had been granted, they would have obtained a period of 4½ years to effect divorcement instead of the one year provided for in the judgment.

[4] The proposed modifications included giving RKO the right to dispose of theatres to other defendants, which the original judgment prohibited.

VI until 1953. These motions were made without having obtained approval thereof by RKO's stockholders, although the plan of reorganization presented to and adopted by the stockholders had called for divorcement by the end of one year from the date of judgment (R. 244–245).[5] One of RKO's motions also sought to extend to February 8, 1953, the time within which appellant Hughes should dispose of his stock in one of RKO's successor companies pursuant to Section V of the judgment. Appellant expressly consented to that request for extension and his counsel was present at the hearing thereon (R. 242).

The district court extended RKO's and appellant's time to effect divorcement until the end of 1950 (Tr., April 19, 1950, p. 81). Prior to that time appellant filed with the district court his election to retain his stock in the new picture company. Shortly before the end of the year, appellant's counsel approached the Government to secure agreement to the terms of a proposed trusteeship for appellant's stock in the new theatre company (Tr., February 15, 1951, pp. 30–32). The Government insisted that one term of the trusteeship should be the sale of the stock by the trustee if appellant did not sell the stock within a specified period, but appellant was unwilling to have such a term included (*ibid*). In order to en-

[5] A number of stockholders who desired an early divorcement were heard by the district court in opposition to the motions.

able appellant to meet his deadline and to present to the district court the terms which were agreeable to both parties, the parties signed and presented to the court a stipulation containing the agreed terms, as well as the statement that it was the understanding of the parties that the Government would file a motion during January 1951 asking for entry of an order establishing as one of the terms of the trusteeship that, if appellant should not have sold the trusteed stock within a year from the date of the court's order, the trustee should sell the stock under terms and conditions to be established by the court (R. 199–200). The stipulation also noted that appellant would contest such motion (R. 200). On December 28, 1950, the district court entered an order appointing a trustee in accordance with the stipulation filed with it (R. 200).

On January 15, 1951, the United States filed the motion contemplated by the stipulation (R. 200). After argument of the motion on February 15 and February 21, 1951, and after filing of supporting and opposing briefs and affidavits, the district court on March 24, 1951, entered the order from which the present appeal is taken (R. 211). The order amends the order of December 28, 1950, appointing a trustee, by providing that, if appellant shall not have disposed of the trusteed stock by February 20, 1953, the trustee shall dispose of this stock by February 20, 1955 (R. 211). The order further provides that the trustee shall

submit for the approval of the court, upon notice to the parties, any proposed disposition of this stock (*ibid.*).

SUMMARY OF ARGUMENT

I

The basic purpose of the RKO consent decree was divorcement—the creation of a new picture company and a new theatre company, wholly independent of one another. According to the terms of the decree, this was to be accomplished within a year.

Section V is an integral part of that decree. It provided that, within the year, appellant, the dominant stockholder in RKO, would dispose of his stock in one of the new companies. He was either to sell such stock or to place it in a voting trust. The latter alternative enabled appellant to avoid the loss and hardship which might result from an immediate, forced sale of stock of a newly created corporation.

Appellant now contends that, having elected to trustee his theatre company stock, he has no further obligation to sell. He points out that the trust states that it shall continue "until [appellant] shall have sold" the trusteed stock, and argues that this means that, unless he elects to sell, the trust is to continue indefinitely. He would accordingly exclude from the scope of the broad provision that the court may prescribe "other terms and conditions" all power to pre-

scribe a reasonable time limit for consummation of a sale.

Such a construction would enable appellant, at his pleasure, to frustrate the primary purpose of the decree—divorcement of the economic interests of the two companies. It would also place upon the antitrust court the anomalous and burdensome duty of supervising a trust which might last for an indefinite period and which, if there is no implied requirement of sale, contains no provision for ultimate disposition of the *res*.

We submit that the language, as well as the related circumstances, indicates that appellant was required, in all events, to sell within a reasonable time. The absence of any other provision for termination makes this the only permissible construction. This was not a trust to continue for a specific period *unless* appellant should sooner elect to sell, but a trust to continue "*until* [appellant] shall have sold" (italics supplied).

The decree grants the courts specific authority to prescribe "other terms and conditions" of the trust. This includes the power to set a reasonable terminal date, by directing the trustee to sell the stock unless appellant should have done so within a specific reasonable time. Such a condition is in harmony with the purpose of the decree and is not inconsistent with any of its provisions. The time actually set for final disposition—more than six years from the date of the original decree—is fair by any test.

II

Even if the court's order be deemed amendatory of the decree—and not merely an order prescribing the terms of the trust, as authorized by the original decree—it was within the authority of the court. The power to modify has two independently sufficient bases: (1) The provisions of the decree reserving jurisdiction to amend; and (2) the inherent equity powers of the court. There can be no real question here that the court's order was wholly consistent with the underlying purpose of the original decree and was, indeed, necessary to insure its fulfillment. Accordingly, the test enunciated by this Court in *Chrysler Corporation* v. *United States*, 316 U. S. 556, is fully satisfied. Moreover, if a showing of changed circumstances should be deemed an additional requisite, appellant's unwillingness to dispose of the stock and his interpretation of the judgment as not requiring him to do so constitute unanticipated developments, occurring subsequent to the entry of judgment, fully warranting a modification. Where, as in this litigation, a decree is framed with a view to the future effectuation of a complex plan of reorganization, it is of particular importance that the court be permitted to take ancillary action calculated to prevent a recalcitrant party from subverting the objectives of the plan.

ARGUMENT

I

THE ORDER APPEALED FROM WAS PROPERLY MADE PURSUANT TO SECTION V OF THE JUDGMENT

As the parties and the district court have recognized, the primary relief provided for in the RKO judgment is divorcement. Section V of the judgment, which relates to the disposition of the stock of the controlling stockholder, was an integral part of the divorcement relief. That section provided for the disposition by appellant himself of his stock in the new picture or theatre company, a year from the date of the judgment, or turning the stock over to a trustee within that time. It was also expressly provided that in the event the stock were trusteed certain terms were to attach to the trust, and that the trust "should be upon such other terms or conditions, including compensation to the trustee, as shall be prescribed by the Court." The terms set out in Section V were (1) granting voting rights to the trustee, (2) granting appellant the right to terminate the trust by selling the stock, and (3) giving the appellant the right to receive the dividends on the trusteed stock "and proceeds from the sale thereof."

Appellant does not deny that the district court could provide for terms implementing the trust, within the framework of the provisions, purposes and limitations of Section V of the decree (Br., p. 9). He contends, however, (1) that he had an option to sell his stock in one of the newly

created companies or to place his holdings in one of those companies in a voting trust; and (2) that his election to place his theatre company stock in trusteeship precludes the court from ordering a sale of this stock. In support of the latter proposition, appellant relies upon the language of Section V which declares that the voting trust shall "remain in force until Howard R. Hughes shall have sold" his interest in the trusteed stock.

It is the Government's position that appellant was, indeed, given an option, but only an option to sell the stock of one of the two new companies within a specified period (one year from the date of judgment) or to place it in a voting trust for an interim period, under the supervision of the court, pending the final effectuation of a sale; that the language "until Howard R. Hughes shall have sold," read in the context of the decree and the litigation which gave rise to it, plainly imports an affirmative duty to sell with reasonable promptitude; and that, after appellant had manifested reluctance to sell, the court was fully empowered, pursuant to the language authorizing it to fix "terms and conditions," to provide that if he did not live up to his obligation by selling his interest prior to February 20, 1953, the trustee should effectuate the sale on his behalf within two years thereafter.

Appellant's construction of the judgment would permit him to retain the beneficial ownership of both corporations. He would have it that the duration of the court-created trust must be left to

his exclusive discretion and that he may, at his pleasure, prevent divorcement of his picture interests and his theatre interests. As Judge Hand remarked, "There is certainly a remedy against that" (R. 252).

A judgment must be construed as a whole and in the light of the "issues it was meant to decide." *Vicksburg* v. *Henson*, 231 U. S. 259, 269; *Felker* v. *Southern Trust Co.*, 264 Fed. 798 (C. A. 8), certiorari denied, 254 U. S. 633; *Hendrie* v. *Lowmaster*, 152 F. 2d 83 (C. A. 6). "Whatever ambiguity arises from some of its parts, its extent must be determined by what preceded it and what it was intended to execute." *Union Pacific R. R.* v. *Mason City &c. R. R.*, 222 U. S. 237, 247. As the parties here and the district court have repeatedly recognized, the primary relief provided for in the RKO judgment is divorcement.[6] Section V of the judgment, which relates to the disposition of the stock of the controlling stockholder, is an integral part of the decree and must be construed accordingly.

Examination of the RKO judgment reveals that it was carefully drawn to insure that the two newly created corporations would be operated

[6] Judgments against other defendant companies in this case also provide for divorcement as between the picture business and the theatre business of each. In addition, the judgments contain provisions limiting the possibilities of common stock ownership of the divorced enterprises. These limitations are directed specifically at large stockholders. See C. C. H. Trade Cases (1948–1949), par. 62,377, pp. 63,026–30. C. C. H. Trade Regulations Reporter (1948–1951), par. 62,765, pp. 64,273–74.

wholly independently of one another. See Sections II B, III E, IV–V, VI B, (R. 173–4, 185–7). Appellant is undeniably the dominant stockholder in the new picture company. If he were to retain his equitable ownership in the theatre company stock, which entitles him to the dividends thereon,[7] he would have a powerful inducement to utilize his control of the picture company to cause it to grant the new theatre company preferences and competitive advantages denied to others—in other words, to continue to operate on the basis of a vertically integrated enterprise, notwithstanding the district court's condemnation of vertical integration in the case of other defendants in the *Paramount* case.

Clearly, the court never intended that appellant could subvert the aim of divorcement by the simple expedient of continued inaction. As Judge Goddard pointed out, "Don't you see if he [appellant] is allowed to keep the stock he is doing just what we intended to prevent; he is enjoying the profits of the two corporations" (R. 265). Referring to the language that the trust would continue "until Howard R. Hughes shall have sold," Judge Coxe commented (R. 250):

> Well, it did contemplate that Mr. Hughes was going to sell his stock. That language, as I read it, certainly makes that fairly clear.

[7] Appellant receives "all dividends and other distributions" on the theatre company stock while the trust lasts (R. 186).

That Judge Hand did not interpret the decree to permit appellant to hold the stock indefinitely appears from the following colloquy (R. 252):

> Judge Hand: Well, you are claiming the most extreme interpretation of that agreement, which really is that he does not have to do anything ever.
>
> Mr. Slack: I think that is what it says.
>
> Judge Hand: That he does not have to do anything ever; that he can say, "Well, I like this stock; it is good enough for me; I can't vote it, to be sure, but that is good enough for me. It is a very pleasant situation I am in, and I am getting the income from it"—whether it is good or bad, I don't know—"And I am going to stick to that."
>
> There is certainly a remedy against that.

Appellant states that he entertained a different understanding. However that may be, the language in question is part of the judgment of the court, and the court's interpretation of its judgment, unless inherently unreasonable, should be decisive. As this Court has stated on numerous occasions, a consent decree is a judgment and not a mere contract. *United States* v. *Swift & Co.*, 286 U. S. 106, 115; *Pope* v. *United States*, 323 U. S. 1, 12. See also pp. 25–26, *infra*. Its construction is accordingly a matter peculiarly within the competence of the court. That would seem to be especially true where, as here, the district court

has had long familiarity with the litigation which formed the matrix of the judgment.[8]

It will be noted that Section V provides generally for judicial supervision of the trust. The court is to prescribe appropriate "terms and conditions." Certainly it will not be seriously suggested that the antitrust court contemplated the continuing supervision of a trust for an indefinite period. On appellant's theory, however, the trust could continue, in Mr. Hughes' discretion, for Mr. Hughes' lifetime, or, for aught that appears from appellant's brief, beyond that. Appellant does not indicate what, in his view, would occur if he failed to effectuate a sale at any time during his lifetime—whether the trust would then continue in perpetuity; whether the court might, at the time of appellant's death, order a sale, notwithstanding Hughes' lack of prior action; or whether the property would descend, free of trust, to Hughes' heirs (a result which would further frustrate divorcement in the event that the same heirs inherited the picture company stock held by appellant). It is unnecessary to explore all possible consequences of appellant's interpretation of Section V; merely to state some of the more obvious

[8] While the 1948 judgment which lies at the root of this case is denominated a consent decree, it is to be noted that it was decreed after a trial, a judgment by the trial court, an affirmance by this Court of many provisions of that judgment (which provisions were incorporated in the 1948 decree), and an admonition by this Court as to the principles to be followed by the district court in respect of other matters.

is to demonstrate that his interpretation is as inconsistent with the functions of an antitrust court as it is incompatible with the purposes of the decree.

There is, of course, a perfectly reasonable interpretation of the function which the voting trust was to serve. If appellant had been directed by the decree to sell his stock in one of the new companies within a year of the judgment (Section V, par. A) and given no alternative, the result might have been to compel a sale at serious economic sacrifice.[9] Accordingly, it was provided that appellant, having decided whether to keep picture company stock or theatre company stock, might place the stock of the other company in a voting trust until it was sold. But a sale was in all events to be effected. Indeed, that conclusion follows from the language used, even apart from the surrounding circumstances. Section V did not provide that the voting trust was to last for a term of years, for Hughes' lifetime, or for any other ascertainable period. The only reasonable explanation is that appellant was to take prompt action to terminate it. Appellant would interpret the decree as if it declared that the trust would continue in force for Hughes' lifetime (or beyond) *unless* Hughes should sooner elect to sell. The decree, however, does not say "unless," but "until"; not "elects to sell" but

[9] Under the terms of the judgment it might be a year before the new companies were formed.

"shall have sold." The trust "shall thereafter remain in force," the decree reads, "*until* Howard R. Hughes *shall have sold* * * *." The obligation to sell within some reasonable time is clear.[10] That the lower court so interpreted the decree appears from the statements quoted at pages 16–17, *supra*.

But whether or not the decree imposed any such *obligation*, it certainly need not be construed, contrary to its purpose, as giving appellant *carte blanche* to retain the stock forever. Any doubt as to the court's authority to implement the decree so as to avoid such a result would be resolved by the provision in Section V (R. 186) that—

> Such trust shall be upon such other terms or conditions, including compensation to the trustee, as shall be prescribed by the Court.

The "other"-terms which the court may prescribe certainly would include terms intended to clarify the original decree in order that it might accomplish its principal purpose. We are not confronted with a situation in which the new term or condition is inconsistent with the provisions of the trust specified in the decree. The

[10] It is of interest to note that even in cases where a settlor has expressly prohibited sale of the trust *res*, the chancery power has been held sufficiently broad to permit the court to override his intention in special circumstances. 3 Bogert Trusts § 742. In the instant case, not only was sale contemplated; the court was granted general authority to prescribe the "terms and conditions" of the trust.

decree did not undertake to spell out in any detail the governing conditions, but gave the court plenary power to prescribe them. The establishment of a terminal date for disposition of the *res* is covered by this broad delegation of authority. There is no conflict whatever between the express provision for termination on sale by appellant, which assumes that appellant will sell within a reasonable time, and the imposition of a condition designed to fill in the gap as to the termination date in the event that appellant fails to act.

Appellee filed its motion seeking a time limitation in January 1951, more than two years after the decree had been entered. As was well known to the district court, in the interim appellant and the RKO defendants had repeatedly manifested considerable reluctance to effectuate the divorcement contemplated by the 1948 decree. (See Statement, *supra*, pp. 7–9.) Moreover, at the hearing on the motion, appellant argued for a construction "that he does not have to do anything ever" (R. 252). In the light of these circumstances, we believe that the court was not merely authorized to fix a terminal date, pursuant to its power to prescribe terms and conditions, but that it was incumbent upon it to do so. The outer time limit actually set by the court's order, February 20, 1955, is more than six years removed from the date of the original decree. By any test, the order must be deemed a reasonable

exercise of the power conferred upon the court, and the result eminently fair to the appellant.

II

In Any Event, the District Court Had Power To Modify the Judgment in Order To Effectuate Its Basic Purpose

In appellee's view, the order of the district court did not modify or amend the consent decree, but prescribed a term of the trust as authorized by the language of the decree. If, however, it be assumed, *arguendo*, that the court's action was tantamount to an amendment, such amendment, it is submitted, was fully within the power of the court.[11]

Section VIII B, which applies to all portions of the decree, provides (R. 188):

> Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this consent decree to apply to the Court at any time for such orders or direction as may be necessary or appropriate for

[11] In this case, RKO obtained two modifications (the second over the Government's objection) permitting it additional time to divorce its picture and theatre activities. Still other amendments have been effectuated by consent. Decrees against the other motion picture defendants have also been amended on frequent occasion. The trial of the *Paramount* case was initiated by a motion to amend a consent judgment of 1940 (R. 128). In the district court, as well as in this Court, the defendants, including RKO, unsuccessfully contended that parts of that judgment could be set aside only by evidence and for cause.

> the construction, modification or carrying out of the same, for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief.

In numerous antitrust cases, this Court has pointed out that the reservation of jurisdiction enables the district court "to take the necessary measures to cause the decree to be fully and faithfully carried out," *e. g., Associated Press* v. *United States,* 326 U. S. 1, 22–23; *Lorain Journal* v. *United States,* No. 26, this Term. It has been held that, even in the absence of specific language, an equity court has the inherent power, in appropriate circumstances, to modify its decree. *United States* v. *Swift & Co.,* 286 U. S. 106, 114; *Ladner* v. *Siegel,* 298 Pa. 487, 497; 148 Atl. 699, 702 (1930). Appellant does not appear to contest this point, but argues (Br., p. 8) that the Government failed to make a showing of good cause.

The Government does not, of course, contend that the power to modify a consent judgment is unlimited. As stated by this Court in *Chrysler Corporation* v. *United States,* 316 U. S. 556, 562, "the test to be applied * * * is whether the change served to effectuate or thwart the basic purpose of the original consent decree [citing *United States* v. *Swift & Co.,* 286 U. S. 106]." In the *Chrysler* case, a consent judgment entered in November 1938 provided that a prohibition

against affiliation with any finance company would expire on January 1, 1941, unless by that date the Government had obtained similar relief as against General Motors, as the result of contemplated civil proceedings against that corporation. When it developed that the General Motors proceedings would not be finally determined by the 1941 date, the Government sought a modification of the Chrysler decree which would extend the time limitation to January 1, 1943. The district court found that the basic purpose of the decree was that Chrysler's rights would ultimately be determined by the outcome of the General Motors proceedings, and that the purpose of the time limitation was to safeguard Chrysler against undue delay on the part of the Government. The court, finding further that the Government had used due diligence in the conduct of the General Motors litigation and that an extension of time would not seriously prejudice Chrysler, changed the date as requested. Holding that the district court's findings were reasonable and that the modification would effectuate the decree's basic purpose, this Court affirmed.

Appellant points out (Br., pp. 16–17) that in the later case of *Ford Motor Company* v. *United States*, 335 U. S. 303, this Court refused to approve a modification in the parallel Ford decree. As the opinion in the *Ford* case discloses, however, the difference in result rests squarely upon a difference in the circumstances and does not

vitiate the principles enunciated in the *Chrysler* decision. The opinion points out (p. 320) that the extension in question was the sixth such extension sought by the Government; that "what was at the time of the *Chrysler* decision a two-year delay * * * has now stretched into a ten-year delay" (p. 321); and that "circumstances that were found extenuating * * * two years after the entry of the decree are hardly compelling ten years afterward" (*ibid.*).[12] The Court further found that Ford was being subjected to a prejudicial competitive disadvantage (pp. 321–2).

Appellant's brief also emphasizes that Justice Frankfurter, who dissented in the *Chrysler* case, wrote the majority opinion in *Ford*. But appellant fails to note that Justice Frankfurter stated in his dissent in the former case (316 U. S. at 567):

> Of course, the District Court had the power to modify the consent decree in order to

[12] Appellant also seeks comfort in *United States* v. *International Harvester Co.*, 274 U. S. 693, and *United States* v. *Radio Corporation of America*, 46 F. Supp. 654 (D. Del.). In each of those cases, however, the modification sought was denied because it was found inconsistent with the basic purpose of the original decree. In the *Harvester* case, the Court found that competitive conditions had been achieved as a result of the original decree and therefore found it unnecessary to amend. In the *Radio Corporation* case, the application to vacate the decree rested entirely upon the Government's unsupported assertion that the public interest required such action.

> effectuate its basic purposes. The fact that the decree embodied the agreement of the parties no more limited the power of the court than if it had been a contested decree.

There can be no dispute that the basic purpose of the instant decree was divorcement. The preamble to the decree explicitly declares: "The RKO defendants hav[e] represented to the plaintiff and to [the] Court that they propose to put into effect * * * a plan of reorganization which will have as its object and effect the divorcement of RKO's production-distribution assets from RKO's theatre assets" (R. 171). To realize that purpose, it was necessary that the controlling stockholder in the old corporation become a party to the settlement and agree to dispose of his interest in one of the two new companies contemplated by the decree.[13] Obviously, if appellant is permitted to retain ownership in the theatre company and ownership and control in the picture company, the basic purpose cannot be achieved. See p. 16, *supra*. This in itself would justify modification of the decree, once appellant's unwillingness promptly to sell the stock became apparent.

[13] Appellant was not a defendant in the original proceedings, for the simple reason that he acquired his holdings subsequent to the commencement of the litigation. Of course, if he had refused to become a party to the consent decree, the Government could have taken steps, in prosecuting the litigation further, to join him as a party defendant, or to secure by other means a prohibition against common stockholding.

Appellant argues, however, that the Government has not shown any fact or circumstance justifying a change in the decree (Br., p. 8), and points to the fact that no evidentiary hearing was conducted below (*id.*, p. 5). But an evidentiary showing is not necessary when the object of the modification sought is to overcome an interpretation of the decree by appellant incompatible with the original basic purpose.

If changed circumstances must be shown in a case such as this, that requisite has been supplied by appellant's course of conduct since the entry of the decree.[14] It was well known to the district court that appellant and RKO had sought numerous extensions and modifications between the time of entry of the decree and the date appellee brought on its motion to establish a time limit for final disposition of the stock (Statement, *supra*, pp. 7–9). Beyond that, appellant's position in opposing the motion, and his position before this Court, is that he need not take a single step to "dispose of his holdings in either of the new companies" (Br., p. 8). That position, characterized by Judge Hand as "most extreme"

[14] It is also significant that the District Court subsequent to the entry of the decree in this case imposed similar conditions of divorcement in the contested decrees entered with respect to other defendants in the original *Paramount* case. It is apparent that appellant and RKO could not, by withholding their consent, have avoided an effective decree of divorcement which would have prevented anyone from having a substantial interest in both production and exhibition.

(R. 252), was certainly not anticipated at the time of entry of the consent decree, and it is one which we believe utterly incompatible with the scheme of that decree. Since appellant conceded in open court that it was his position that "he does not have to do anything ever" (R. 252), it would have been utterly futile to hear further evidence going to the question of appellant's willingness to make final disposition of the stock with reasonable promptitude. There could be no more eloquent testimony of a determination to frustrate the basic purpose of the decree.

As is frequently the case in major antitrust suits which terminate in the formulation of provisions for relief, the judgment here is one of considerable complexity. Running to nineteen printed pages (R. 170–188), it provides, among other things, for trade practice relief, divorcement, and divestiture. Express reservation of power to modify the judgment, as is customary in judgments of this kind, is a recognition of the fact that it is scarcely possible to foresee all contingencies or to resolve in advance all matters which may require court determination. This power to modify in order "to effectuate * * * the basic purpose of the * * * decree" (*Chrysler Corporation* v. *United States*, 316 U. S. 556, 562) is certainly adequate to prevent appellant here from postponing *ad infinitum* the event which will terminate the court-created trust and which

alone will make the divorcement, to which the parties subscribed in principle, a true and effective divorcement.

CONCLUSION

The order of the district court should be affirmed.

Respectfully submitted.

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